JAY HORENSTEIN; KEVIN WASHINGTON, individually and on behalf of all persons similarly situated, Plaintiffs–Appellants, v. MORTGAGE MARKET, INC., an Oregon corporation; MARTY FRANCIS, Defendants–Appellees.

No. 99–36125

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2001 U.S. App. LEXIS 9267; 9 Fed. Appx. 618

December 13, 2000, Argued and Submitted, San Francisco, California; December 15, 2000, Submission Vacated; May 3, 2001, Submitted

May 10, 2001, Filed

NOTICE:
[*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY:
Appeal from the United States District Court for the District of Oregon. D.C. No. CV–98–01104–ALA. Ann L. Aiken, District Judge, Presiding.

DISPOSITION:
AFFIRMED.

CASE SUMMARY

PROCEDURAL POSTURE: The United States District Court for the District of Oregon found that appellants' Fair Labor Standards Act (FLSA) claims were subject to arbitration. Appellants filed an appeal.

OVERVIEW: The instant court found that appellants' argument that because the arbitration agreements specifically superseded all prior agreements, thus voiding the arbitration clause in their employment agreements, failed. The district court previously invalidated the arbitration agreements in their entirety, which appellants did not challenge. There were two separate agreements, the arbitration agreement which was pervaded with illegality; the employment agreement which, standing alone, was a standard and inoffensive arbitration provision. Appellants' contention that the arbitration clause in the employment agreements may not have been enforced because it eliminated their statutory right to a collective action, was insufficient to render an arbitration clause unenforceable. There was nothing indicating that Congress intended to preclude arbitration of FLSA claims. Appellants knowingly signed an agreement to arbitrate their statutory claims; accordingly, they abandoned their right to enforce those claims as part of a class action. Appellants' state law claims were also subject to arbitration.

OUTCOME: The judgment was affirmed.

COUNSEL:
For JAY HORENSTEIN, KEVIN WASHINGTON, Plaintiffs – Appellants: Phil Goldsmith, LAW OFFICE OF PHIL GOLDSMITH, Portland, OR.

For MORTGAGE MARKET INC., MARTY FRANCIS, Defendants – Appellees: Christopher R. Ambrose, Esq., AMBROSE LAW GROUP, Michael G. Hanlon, Esq., Portland, OR.

JUDGES:
Before: FERGUSON, KLEINFELD and HAWKINS, Circuit Judges.

OPINION:

[618]**

MEMORANDUM *

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36–3.

The Federal Arbitration Act ("FAA") applies to this case, *Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 149 L. Ed. 2d 234, 121 S. Ct. 1302 (2001)*, and Section 16 **[*2]** of the FAA governs our jurisdiction. When a district court "has ordered the parties to proceed to arbitration, and dismissed all the claims before it, that decision is 'final' within the meaning of 16(a)(3), and therefore appealable." *Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 121 S. Ct. 513, 521, 148 L. Ed. 2d 373 (2000).*

Appellants' argument that because the Arbitration Agreements specifically superseded all prior agreements, thus voiding the arbitration clause in their Employment Agreements, fails. The district court previously **[**619]** invalidated the Arbitration Agreements in their entirety, which appellants do not challenge. The appellants accordingly cannot rely on the invalidated supersession clause in this appeal. Moreover, we agree with the district court that it is inappropriate "to interpret the contract language in a manner contrary to the obvious intent of the parties that some type of arbitration apply."

We also reject appellants' contention that the Arbitration Agreements and the Employment Agreements were elements of one intertwined scheme, such that the arbitration clause should be struck under *Graham Oil Co. v. Arco Products Co., 43 F.3d 1244 (9th Cir. 1994).* **[*3]** The arbitration clause invalidated in Graham Oil was a "highly integrated unit" that represented "an integrated scheme to contravene public policy." *Id. at 1249.* The district court here voided the entire Arbitration Agreements, not merely the offensive provisions, specifically relying on Graham Oil's "integrated scheme" theory. The district court, however, properly refused to extend Graham Oil to the arbitration clause in the separate Employment Agreements. In Graham Oil, there was only one arbitration clause, a clause pervaded with illegality. Here there are two separate agreements, one of which is pervaded with illegality; the other, standing alone, is a standard and inoffensive arbitration provision.

Appellants' contention that the arbitration clause in the mployment Agreements may not be enforced because it eliminates their statutory right to a collective action, is insufficient to render an arbitration clause unenforceable. See *Johnson v. West Suburban Bank, 225 F.3d 366, 370–71 (3d Cir. 2000)* (burden of establishing that Congress meant to preclude arbitration for a statutory claim rests on party seeking to avoid arbitration) (**[*4]** citing *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991)).* While intent to preclude arbitration of a statutory claim may be found in the text of the statute, its legislative history, or in an inherent conflict between arbitration and the statute's underlying purposes, *225 F.3d at 371*, there is nothing in the text, and plaintiffs have shown nothing in the legislative history, indicating that Congress intended to preclude arbitration of FLSA claims. Although plaintiffs who sign arbitration agreements lack the procedural right to proceed as a class, they nonetheless retain all substantive rights under the statute. *Id. at 373.* "Only those who consent to [] agreements with binding arbitration clauses are forced to abandon [a class action]; those who do not consent to arbitration in their contracts have the full selection of forums." *Id. at 378* (discussing Gilmer). The appellants here knowingly signed an agreement to arbitrate their statutory claims; accordingly, they abandoned their right to enforce those claims as part of a class action.

The appellants' FLSA claims are subject to arbitration. See *Kuehner v. Dickinson & Co., 84 F.3d 316, 319 (9th Cir. 1996).* **[*5]** The appellants' state law claims are also subject to arbitration. Oregon law contains a provision substantially identical to the FAA stating that arbitration agreements shall be "valid, irrevocable, and enforceable." Or. Rev. Stat. § 36.305. Appellants have pointed to no authority that claims founded in state statute are exempt from this rule.

AFFIRMED.